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Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of

Compatibility Between Cable Systems  
And Consumer Electronics Equipment

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PP Docket No. 00-67/

JUN 8 2000

**REPLY COMMENTS OF FOX ENTERTAINMENT GROUP, INC.**

Fox Entertainment Group, Inc. ("Fox"),<sup>1/</sup> by its attorneys, hereby submits its reply comments in the above-captioned proceeding.<sup>2/</sup>

**INTRODUCTION**

The record in this proceeding amply demonstrates the importance of protecting content in the digital environment.<sup>3/</sup> Indeed, ensuring that content is protected is the best way to ensure that Americans enjoy the full benefits of the fast emerging digital "revolution." Fox and others are working to ensure that the public will have a vast array of entertainment, educational, and

<sup>1/</sup> Fox filed initial comments in this proceeding, as did Fox Broadcasting Company. See Comments of Fox Entertainment Group, Inc., filed May 24, 2000 ("Fox"); Comments of ABC, Inc., et al., filed May 24, 2000 ("Broadcast Networks").

<sup>2/</sup> Compatibility Between Cable Systems and Consumer Electronics Equipment, Notice of Proposed Rulemaking, PP Docket No. 00-67, FCC No. 00-137, rel. April 14, 2000 ("Notice").

<sup>3/</sup> See e.g., Comments of the Motion Picture Association of America, Inc., filed May 24, 2000, at 3 ("MPAA"); Comments of Metro-Goldwyn-Mayer Studios, Inc., filed May 24, 2000, at 1 ("MGM"); Comments of Viacom Inc., filed May 24, 2000, at 2 ("Viacom"); Comments of Turner Broadcasting System, Inc., et al., filed May 24, 2000, at 2 ("Cable Networks").

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informational programming choices available in the digital future.<sup>4/</sup> The Commission should do nothing to undermine these efforts.

Fox pointed out in its comments that comprehensive and secure content protection is essential to the public interest. No parties dispute the importance of protecting content, or the consequences of failing to do so. Still, some parties would have the Commission leave a large gap where it could hurt consumers most. They claim that over-the-air broadcast television should be left behind when it comes to content protection. This makes absolutely no sense.

The Commission should not prevent content providers and broadcasters from protecting over-the-air broadcast television. The record shows that audiovisual content faces ever-increasing risks when transmitting digitally.<sup>5/</sup> The instantaneous, worldwide retransmission of televised programming over the broadband Internet poses a serious threat to the future of the broadcast medium.<sup>6/</sup> Accordingly, programmers should be able to encrypt or otherwise protect broadcast television without undue consequences under the Commission's rules.

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<sup>4/</sup> See, e.g., Comments of Time Warner Cable, filed May 24, 2000, at 8 ("Time Warner") (noting that negotiations are progressing); MGM at 1-2 (stating that MGM has been involved in discussions with manufacturers and the cable industry over the terms and conditions of potential copy protection licenses relative to the digital transmission of content); Comments of the Consumer Electronics Association, filed May 24, 2000, at 7 ("CEA").

<sup>5/</sup> See MPAA at 3; Viacom at 2 (citing examples of the kinds of threats audio-visual content owners face).

<sup>6/</sup> See Fox at 17; Broadcast Networks at 3 (stating that if content owners cannot be assured that broadcast television will be protected from unrestricted copying, they are likely to sell their programming to cable and other pay channels); Cable Networks at 2 (quoting the statement of Commissioner Ness that "[g]iven the ease with which digital information can be replicated, the perfect quality of every digital copy, and the limitless distribution potential of the Internet, content providers understandably are concerned about placing their works on a cable system or broadcast network without adequate protections in place.").

A number of parties also suggest that there is a “bright line” distinction between conditional access mechanisms and content protection (or “copy control”).<sup>7/</sup> This sort of “reasoning” is hollow. The purpose of conditional access is to protect content from unauthorized use. If the Commission wishes to encourage the deployment of digital television, it cannot preclude effective protection of digital signals. Doing so would leave providers without the ability to ensure the security of their service, and undermine efforts to protect content elsewhere in the digital distribution “chain.”

While the issues presented in this proceeding are complex, they do not necessarily call for Commission intervention at this time. Numerous negotiations are under way, and much progress has been made. By encouraging workable, market-driven solutions within this framework, the Commission will best ensure the timely deployment of digital television.

#### **I. OVER-THE-AIR BROADCAST TELEVISION MUST BE PROTECTED**

None of the commenting parties disputes the importance of protecting copyrighted programming.<sup>8/</sup> The public benefits when content is protected by enjoying the broadest array of choices in the market.<sup>9/</sup> Over-the-air broadcast television is one of the most important sources of such programming to the public.<sup>10/</sup> As demonstrated in Fox’s initial comments,<sup>11/</sup> the economics of broadcast television are particularly vulnerable to the threat posed by unlimited, unencumbered, instantaneous, worldwide distribution over the broadband Internet. Television

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<sup>7/</sup> See Comments of Thomson Consumer Electronics, Inc., filed May 24, 2000, at 8 (“Thomson”); CEA at 17, 18.

<sup>8/</sup> See, e.g., CEA at 6; Broadcast Networks at 1; Comments of the “5C” Digital Transmission License Administrator, filed May 24, 2000, at 1 (“5C”).

<sup>9/</sup> See Fox at 5; Broadcast Networks at 1 (The broadcast networks and their affiliates provide free television service to almost every home in the U.S.).

<sup>10/</sup> See Broadcast Networks at 1.

<sup>11/</sup> See Fox at 7-8.

programmers and broadcasters should therefore be allowed -- indeed, encouraged -- to take whatever reasonable measures they see fit to protect the product.

Digital programming broadcast free to viewers over-the-air is no less susceptible to copying and unauthorized distribution than any other form of digital content. Yet, a few commenters would ignore this entirely and leave broadcast television without protection, and its millions of viewers without an option.<sup>12/</sup> Remarkably, they go so far as to defend their position as incidental to their own customers' existing ability to tape analog broadcast programming for later viewing in the home (so-called "time shifting").<sup>13/</sup>

To begin with, this proceeding is not the proper forum -- and the Commission is not the proper venue -- for reaching conclusions about the legal ramifications of home taping under the Copyright Laws of the United States.<sup>14/</sup> Nor is this proceeding the appropriate place to define the proper contours of the "fair use" defense to copyright infringement. That can take place only in Congress or the courts. Suffice it to say, however, that the manifest harms to broadcast television that would accompany unrestricted digital taping and unauthorized Internet distribution would hardly withstand scrutiny under existing case law.<sup>15/</sup> In any case, it would

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<sup>12/</sup> See Comments of the Information Technology Industry Council, filed May 24, 2000, at 5 ("ITI"); CEA at 20; Comments of the Home Recording Rights Coalition, filed May 24, 2000, at 15 ("HRRC").

<sup>13/</sup> See CEA at 16-17; Comments of Philips Electronics North America Corporation, filed May 24, 2000, at 7 ("Philips"); Comments of Circuit City, filed May 24, 2000, at 5 ("Circuit City"); HRRC at 14.

<sup>14/</sup> CEA urges the Commission to adopt copyright policies, CEA at 16, as does DTLA. DTLA at 15. But these requests are totally misplaced.

<sup>15/</sup> See Fox at 9, 16. The distribution of first market programming over the Internet could eliminate the availability of syndication and secondary licenses; thereby making it near impossible for broadcasters to earn back their license fees in advertising and for content owners to recoup their investments. If televised programming can be transmitted over the Internet at virtually no cost, the current broadcast television model could foreseeably collapse. See, e.g., Twentieth Century Fox Film Corp. et al., v. iCraveTV et al., No. 00-121 (W.D. Pa., Feb. 8, 2000)

make little sense for the Commission to countenance arguments that ignore entirely the well-established marketplace fundamentals that make television programming accessible to hundreds of millions of Americans.

As Fox demonstrated in its initial comments,<sup>16/</sup> the result of any regulation that precludes broadcast television programming from utilizing reasonable content protection measures will be to drive high quality programs to more secure (and restricted) outlets. The Commission should therefore not preclude broadcasters from employing encryption and other content protection measures to meeting the heightened risks to content posed by digital transmissions.<sup>17/</sup>

Broadcasters must be allowed to use encryption and other measures to protect television programming.<sup>18/</sup> Digital broadcasts should not be precluded from the basic programming tier simply because they are delivered on a conditional access basis. It would be short-sighted to require otherwise. Moreover, digital hardware must provide protection as contemplated by these measures.<sup>19/</sup>

## **II. CONDITIONAL ACCESS MECHANISMS MUST BE ALLOWED TO EMPLOY COPY PROTECTION FUNCTIONALITY**

The Commission recognizes that copyright protection in the digital age is “[l]ike a chain that is only as strong as its weakest link.”<sup>20/</sup> It follows, therefore, that all digital devices -- and interfaces -- must provide the level and type of protection afforded to digital programming. If

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(finding that U.S. Copyright laws were violated when a website intercepted television signals and re-broadcast the programming over the Internet without permission).

<sup>16/</sup> Fox at 18.

<sup>17/</sup> Importantly, this should not affect the availability of free, over-the-air television.

<sup>18/</sup> See MGM at 1; MPAA at 8; Fox at 15.

<sup>19/</sup> See Fox at 6; Comments of Motorola, Inc., filed May 24, 2000, at 3 (“Motorola”); MPAA at 4. Contrary to CEA’s suggestion, content protection would not “burden” consumers, CEA at 15, but instead make it possible for the public to continue receiving the programming it expects.

<sup>20/</sup> Notice at ¶ 1.

that means that digital point of deployment (“POD”) modules and host devices must be allowed to facilitate the implementation of copy protection technologies, then it is necessary to do so.<sup>21/</sup> Unless the interface between the POD module and the source device is covered by copy protection measures and secure, the “chain” will be broken and content left unprotected. If that happens, it will only be a matter of time before high value content becomes far too expensive to distribute widely.<sup>22/</sup>

A few commenters attempt to evade the issue by arguing, as one put it, that there is “never any . . . justification” for defeating conditional access mechanisms, but “unauthorized copying . . . has been recognized” as fair use.<sup>23/</sup> But this conflates the issue: whether some forms of unauthorized copying are “fair use” does not make all copying “fair use.”<sup>24/</sup> Whether a signal has been “paid” for is therefore not the question;<sup>25/</sup> instead, the question is “what” use has been authorized. It is for these very reasons that the Commission’s rules do not preclude the use of digital POD modules and host devices to facilitate the implementation of copyright protection

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<sup>21/</sup> Motorola at 3; MPAA at 4.

<sup>22/</sup> See Comments of the Professional and Collegiate Sports Leagues, filed May 24, 2000, at 2 (“Leagues”). The programming owned by the Leagues and other content owners is expensive to create, and without a guarantee of adequate digital copy protection, the protection otherwise afforded to this content by the copyright laws is meaningless. See *id.* See also Viacom at 2-3 (noting that without an effective content protection scheme, content providers will have reduced incentives to make their programming available in digital formats.).

<sup>23/</sup> HRRC at 11. See also CEA at iii, 17-18.

<sup>24/</sup> See, e.g., Encyclopedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1179 (W.D.N.Y. 1982) (emphasizing that the substantiality of copying and the harmful effects to the copyright owner’s market can outweigh any fair use purposes of copying). See also Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (stating that if the intended use is for commercial gain, the presumption is against fair use).

<sup>25/</sup> Cf. HRRC at 11.

functionalities.<sup>26/</sup> Safeguarding content at the interface between proprietary and non-proprietary technology is of critical importance.

### **III. THE COMMISSION SHOULD ENCOURAGE WORKABLE, MARKET-DRIVEN RESOLUTIONS TO THESE ISSUES.**

Despite their complexity, there is no reason for the Commission to doubt that the issues raised in this proceeding will be resolved without its direct intervention. The Commission itself noted that market-driven solutions would be preferable in this context.<sup>27/</sup> Indeed, since the Notice was first issued, the cable and consumer electronics industries have reached accord on one of the matters presented for comment.<sup>28/</sup> The parties have every incentive to resolve their remaining disagreements in order to move forward and begin fulfilling the promise of digital television. The Commission can best serve the public interest by encouraging a market-driven solution, rather than by imposing a government mandate at this time.

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<sup>26/</sup> See Commercial Availability of Navigation Devices, Report and Order, 13 FCC Rcd 14775, 14800 ¶ 63 (1998).

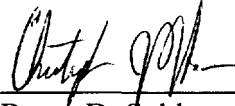
<sup>27/</sup> Notice at 3. (“The Commission has encouraged and facilitated these discussions, in the hope and belief that comprehensive market-driven solutions were attainable and would be superior to a regulatory approach.”) Id.

<sup>28/</sup> On May 24, 2000, NCTA and CEA submitted a letter to the Commission informing the Commission that they had reached an agreement regarding the appropriate labeling that will be required for digital television sets without a 1394/5C connector. See Letter from Robert Sachs, President and CEO, National Cable Television Association and Gary Shapiro, President and CEO, Consumer Electronics Association, PP Docket No. 00-67 (May 24, 2000).

## CONCLUSION

For the foregoing reasons, the Commission should not prevent digital content, including over-the-air broadcast television programming, from being protected under all circumstances and through any reasonable means.

Respectfully submitted,



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June 8, 2000

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